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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 363

LUCY C. SIMONS,
Petitioner,

vs.

MIAMI BEACH FIRST NATIONAL BANK, as Executor of the Estate of SOL SIMONS, Deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

To the Honorable Earl C. Warren, Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, LUCY C. SIMONS, respectfully prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of Florida, Third District, the opinion having been filed on October 29, 1963, and reported in 157 So.2d 199. A petition for rehearing in the District Court of Appeal of Florida, Third District, was denied November 22, 1963. A timely petition for writ of

certiorari was filed on January 21, 1964, in the Supreme Court of Florida and copy filed with the Clerk of the District Court of Appeal of Florida, Third District (Tr. 62), which stayed all proceedings until denial of that writ by the Supreme Court of Florida on May 13, 1964.

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Third District, dated the 29th day of October, 1963, is now reported in 157 So.2d, at page 199, and a copy thereof is reproduced and attached at Appendix "A", *infra*, page A1.

JURISDICTION

The opinion of the District Court of Appeal of Florida, Third District, was made and entered as aforesaid on the 29th day of October, 1963. Petition for rehearing was filed within the time allowed by the Florida Rules of Appellate Practice, which stayed any issuance of the mandate on the original opinion. The petition for rehearing was denied by the said District Court of Appeal of Florida, Third District, on November 22, 1963, as shown in Appendix "A," page A4. A timely petition for certiorari was filed in the Supreme Court of Florida on the 21st day of January, 1964, which stayed proceedings until the petition for certiorari was denied and the Supreme Court of Florida refused to take jurisdiction. This order, as aforesaid, was entered on May 13, 1964, a copy of which is attached as Appendix E.

The petition is filed timely (Title 28 U.S.C., § 2101). The jurisdiction of the Supreme Court of the United States is invoked under Title 28 U.S.C., § 1257, as a certiorari

from the final judgment or decree rendered by the highest Court of the state in which a decision can be had. The District Court of Appeal of Florida is the highest state Court where the petitioner unsuccessfully petitioned for further discretionary review in the Supreme Court of Florida (*Douglas* v. *People of the State of California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811).

QUESTIONS PRESENTED

Lucy C. Simons and Sol Simons had been married in the State of New York for many years prior to 1946. They lived continuously in New York as their matrimonial domicile. On the 25th day of November, 1946, a permanent decree of separation was entered in favor of the wife, Lucy C. Simons, on grounds of cruelty, and allowance was made for permanent alimony. The husband, Sol Simons, continued to live in an apartment where the parties had lived during their marriage and he, the husband, remained domiciled in that same apartment until he died in New York on October 26, 1960.

In 1952 Sol Simons, the husband, purported to set up an alleged domicile in Dade County, Florida and filed a suit for divorce on the same grounds which he had asserted unsuccessfully in the Supreme Court of New York, wherein that Court found against Sol Simons on his alleged grounds for separate maintenance and ruled in favor of the wife, Lucy C. Simons.

In the Florida suit service by publication was issued. The wife did not enter her appearance in the State of Florida, although admittedly she had knowledge of the filing of the suit in Florida. At the time the Florida suit was filed a petition was still pending in the Supreme

Court of New York wherein the wife sought an increase in alimony. There were contested hearings in which the said Sol Simons personally appeared. During the time the suit was pending in the Supreme Court of New York asking for modification of the alimony, the husband continued to prosecute his suit as plaintiff for a divorce in the State Court of Florida. The Supreme Court of New York rendered its amended opinion and order granting relief to the plaintiff for additional alimony, which order was entered on the 31st day of March, 1952 (see Tr. 206). A final decree of divorce was granted in the State Court in Florida on the 30th day of April, 1952. The husband at no time left his domicile in the State of New York, but purported to set up a residence in the State of Florida, which the petitioner claimed was wholly fictitious.

Sol Simons continued, as contended by the petitioner, without interruption as a citizen and resident of the State of New York, in the same apartment in which he and his wife had lived and where he continuously lived until he died on the 26th day of October, 1960.

Upon the death of Sol Simons in New York a will was filed for probate in the County Judge's Court in and for Dade County, Florida, wherein the Miami Beach First National Bank was executor. The will made no provision for Lucy C. Simons, who in the State of New York was the legal widow of Sol Simons and was entitled as the surviving wife to certain portions of the estate of Sol Simons.

The wife filed a petition in the County Judge's Court in and for Dade County, Florida, claiming to be the wife of Sol Simons as of the date of his death and claiming a dower interest or widow's rights in his estate. The executor filed an objection on the sole ground that the decree

of divorce entered in the ex parte proceedings in Florida in April, 1952, was a complete bar to any claim.

Under the procedure in Florida where objection is made by an executor to a claim of dower or property rights of a wife or where a claim of any kind is contested, the Circuit Court has jurisdiction to determine these matters. On February 23, 1962, Lucy C. Simons filed her complaint in the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County, case No. 62C 1980. This complaint, as shown in the Transcript of the Record beginning on page 1, set forth the status of the domicile. The complaint also set forth that the residence of Sol Simons at the time of his death was New York City, and set forth other detailed allegations as to why the alleged residence claimed by Sol Simons in Florida in 1952 was false and fraudulent. Attached to that complaint as exhibits, on page 12 of the Transcript is shown the petition for dower; a copy of the judgment of the Circuit Court of Dade County, Florida, dated April 30, 1952, is shown on page 15 of the Transcript; a certified copy of the decree for separate maintenance from the Supreme Court of New York County, State of New York, entered on November 25th, 1946, is shown in the Transcript on pages 16 through 22.

The motion to dismiss filed by the executor was denied by the Judge of the Circuit Court (Tr. 27) and the executor was required to answer. The answer of the executor was then filed (Tr. 28) and claimed, among other matters, that Sol Simons was a resident of Dade County, Florida, at the time of his death on October 26, 1960. The answer further set forth that the widow's rights to take anything from the estate of her husband were barred because of the final decree of divorce entered on April 30, 1952.

The Court heard extensive testimony, at which time various exhibits were introduced and numerous witnesses were heard, particularly with reference to the fact that the proceedings in Florida brought by Sol Simons were void on their face and that the Florida Court had no jurisdiction of any matrimonial disputes between Sol Simons, the husband, and Lucy C. Simons, the wife, in that the alleged ninety-day residence claimed by Sol Simons had never severed his residence and citizenship in New York State and at the time of his death he was a resident of New York and the rights between the parties were governed by the decree of separate maintenance as entered in 1946.

The decree of the Circuit Court is shown in the Transcript at page 34, and that Court's opinion was based solely upon one issue. That issue was that under the Florida law the service by publication was absolutely binding upon the wife in New York State if it could be shown that she received that notice of the pendency of the suit in the Florida Court. The Court in effect held that since admittedly Lucy C. Simons knew about the suit and failed to appear in Florida to contest the suit, she was thereafter barred from attacking the validity of that decree unless she could allege and prove that she had been misled or that the deceased husband had made misrepresentations or inducements which prevented her from entering into the contest in Florida. The Court did not make any findings that Sol Simons had a bona fide or legal residence in Florida at the time he instituted the suit in March, 1952. The lower Court made no effort to determine whether that residence was purely a fiction. The lower Court made no effort to determine whether Sol Simons continued to be a resident of the State of New York from April 30, 1952, until the time he died in New York in October, 1960.

A notice of appeal was filed on the 26th day of March, 1963, and assignments of error were filed (see Tr. 37) and among the seven assignments of error, assignment of error No. "3" directly asserted that the Florida State Court was in error in failing to hold that at the time Sol Simons died Lucy C. Simons was his wife under the laws of New York, and that in failing to so hold the Court had failed and refused to give full faith and credit under the United States constitutional provision of the proceedings in the State of New York under which permanent separation for alimony without divorce had been entered in 1946.

The assignments of error further specifically charged that the marital status of the parties had been determined by the New York proceedings, in which both parties had entered personal appearances and which was binding upon the parties up to the time of the death of Sol Simons in October, 1960.

On the appeal to the District Court of Appeal of Florida, Third District, that Court rendered its opinion on October 29, 1963, which is shown in the Transcript of the Record at page 41. The opinion of the Court is attached hereto as Appendix A, p. A1.

In this opinion the Appellate Court in speaking of Mr. Simons found:

> "The husband was granted a final decree of divorce in his Florida suit on May 1, 1952. He continued to pay support money as previously ordered by the New York court until he died in 1960."

The Appellate Court did not consider the legal status and matrimonial domicile or residence of Sol Simons from 1952 to the date of his death in October, 1960, except to confirm the fact that Sol Simons continued to make the

payments of alimony as fixed under the New York decree up until the time of his death. The Court concluded in its opinion as follows (Tr. 42):

> "By choosing not to appear in the Florida divorce suit the non-resident wife was precluded from filing suit years later to set aside the decree for matters which could have been litigated by her in defense of the divorce suit. She had due notice and opportunity to contest the husband's allegations as to his jurisdictional residence and his asserted ground of divorce. If she had defenses to those matters it was her duty to assert them in the divorce suit, and the chancellor was eminently correct in holding she was not entitled to maintain the present suit to set aside the decree for those reasons." (Quoting certain Florida decisions).

On November 13, 1963, Lucy C. Simons, through her counsel, filed a petition for rehearing and/or clarification, which is shown on pages 44 through 61 of the Transcript. A copy of this petition is attached hereto as Appendix B, p. A4.

The petition for rehearing was denied in the District Court of Appeal of Florida, Third District, on November 22, 1963, and a timely petition for a writ of certiorari to the District Court of Appeal of Florida, Third District, was filed in the Supreme Court of Florida on January 21, 1964. Under the Florida appellate practice a true copy of the petition for writ of certiorari must be filed with the District Court of Appeal of Florida, Third District, simultaneouslv with the filing of the original petition in the Supreme Court of Florida. A copy of this petition for writ of certiorari is a part of the certified record, beginning on page 62 of the Transcript, and a copy is attached hereto as Appendix D. p. A26.

That petition for a writ of certiorari, the granting of which is discretionary with the Supreme Court of Florida,

was denied without opinion and without the Supreme Court of Florida taking jurisdiction on the merits. The date of the entry of that order by the Supreme Court is May 13, 1964 and the order was filed with the Clerk of the District Court of Appeal of Florida, Third District, on June 1, 1964. A certified copy of said order is attached to the record and a copy is attached hereto as Appendix E, p. 39.

In the assignments of error filed in the first appeal to the District Court of Appeal of Florida, Third District, in the petition for rehearing filed after the opinion of the District Court of Appeal of Florida, Third District, had been issued, and in the petition for a writ of certiorari filed in the Supreme Court of Florida, the said Lucy C. Simons had asserted and maintained her position at all times that the proceedings in the divorce action in 1952 in the Circuit Court of Dade County, Florida, were void because:

(1) The proceedings in New York and the judgment thereon in 1946 were res judicata as to the marital status of the parties;

(2) That under the decree Lucy C. Simons continued to be the wife of Sol Simons and that on the date of his death in New York City the marital status was still determined by that New York decree;

(3) That as his wife at the time of his death in New York City she was entitled to her widow's rights, which were similar in many respects to a wife's claim for right of dower under the Florida law;

(4) That the wife's rights, controlled and covered as they were by the New York decree, could not be severed by the alleged fictitious residence of Sol Simons in Florida and relied upon to give validity to the Florida proceedings;

(5) That the Florida Courts were bound to give full faith and credit to the New York decree and that the Florida Courts did not have jurisdiction by a mere ex parte divorce action in Florida, based upon substituted service by publication, to deprive the wife of her constitutional and statutory property rights granted to her and protected by the New York proceedings.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Statutes

(1) U.S.C.A., Title 28, § 1738, 62 Stat. 947:

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947."

(2) Constitutional Provisions, United States Constitution, Article IV, Section 1:

"Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

STATEMENT

In the statement of the questions involved and the reference to the record we have set forth in some detail the steps taken in the Courts of Florida and we will merely summarize the factual background.

The petitioner, Lucy C. Simons, and Sol Simons were married in 1941.. The certified records in the Supreme Court of New York which were presented to the Florida Court are shown in the Transcript of the Record beginning on page 16 through page 22. The husband and wife were both personally served and were in the Court personally and through their attorneys. The Court in its decree filed November 25, 1946, fully outlined the background of the marriage relationship since the time of the marriage in 1941 up until the time of the separation and consequent suit for separate maintenance, as reflected in the decree above mentioned. In that opinion the Court pointed out that the basis of the wife's complaint was that the husband was autocratic and tyrannical and his actions were such as to constitute inhuman treatment. As pointed out in the opinion, the husband denied those claims and made the further claim that the wife's actions were the cause for the disagreement between the parties. The Court found (see Tr. 20):

"On the facts I believe that the plaintiff was a dutiful and loving wife, and that she did everything in

her power to make a go of this marriage. I believe that the husband's testimony is unworthy of belief. I believe he was tyrannical, despotic; that he is a consummate actor; that he turns on tears as one would turn on Croton water.

* * *

I believe that he was cruel; that he was inhuman; that he beat his wife, who is five feet one inch and weighs 120 pounds; that he is six feet and weighs over 250 pounds; and I believe that every action on his part was calculated to and did bring about a nervous condition in his wife, and that no woman has a right to stand it."

We point this out because we have squarely raised on behalf of the petitioner the question that not only did the New York Court have the right to determine the factual issues between the parties as of 1946, but that all of the testimony had been presented by both the plaintiff and the defendant and that there had been a factual determination by the New York Court. Thereafter, as charged in the complaint in the State Court of Florida and as shown in the record of the testimony submitted herewith, the husband's procedure in the Florida Court was wholly illegal. The plaintiff, the petitioner herein, charged that the State Court of Florida never had any jurisdiction over the husband, nor did it have jurisdiction over the matrimonial affairs, because his residence in Florida was merely a fiction; that the lower Court in Florida entered a decree based upon a finding that Lucy C. Simons, the wife, had actually filed her appearance and answer in the State Court, which was wholly fictitious and improper; and further it was contended that the exact grounds for divorce and the exact facts for divorce sought to be established in the Florida case were identically the same grounds and the same facts presented to the New York Court in 1946 and upon which a rul-

ing was made adverse to the husband's contentions. Voluminous testimony was taken in the Court below and many of the depositions were read into the record which conclusively established that Sol Simons never left his permanent residence and domicile in New York; that he continued to maintain the same apartment in which the parties had resided prior to 1946; that he maintained that apartment, having a housekeeper at all times; that he was never away from that place of residence in New York for more than several weeks at a time, and that he continued to keep his automobile, or at least one automobile, and conducted his business from that apartment. The testimony will clearly show that even his Florida lawyer advised him that he would have to give up his apartment and permanent abode in New York as a part of his alleged establishment of a residence in Florida, but which he never did. At the best the testimony merely showed that he rented an apartment in Miami, Florida, and he was here for several weeks and immediately departed and went back to New York after May 1, 1960, and never established any residence in Florida, but continued without any break or change until he died in October, 1960, in New York. The lower Court and the appellate Court in Florida did not give any consideration at all and made no effort to pass upon these factual matters.

We have pointed out that in the opinion of the District Court of Appeal of Florida, Third District, the Court used as its sole reason for affirming the lower Court the fact that Lucy C. Simons actually received the service from the Florida Court by mail and that upon the advice of her then New York counsel and relying upon the proceedings in New York she did not enter any appearance or contest in the Florida Court.

When Sol Simons died he left a Will, as pointed out in the opinion, and the Miami Beach First National Bank, Miami Beach, Florida, was named as the executor and proceedings for probate of that Will were filed in the County Judge's Court in Dade County, Florida. As reflected in the record, the assets of the estate of Sol Simons were largely, if not entirely, intangible property, such as stocks and bonds. The effect of this opinion by the Florida court was to deny the legal wife in New York any widow's claims, either by dower or otherwise, in an estate consisting almost wholly of intangible property in an amount in excess of $1,000,000.00. The only factual matter which was referred to in the opinion of the District Court of Appeal of Florida, Third District, was the mere statement that Sol Simons died in 1960. No efforts were made by the lower Court or the appellate Court of Florida to consider whether the divorce decree in Florida was utterly void or whether Sol Simons ever set up a legal residence even under the laws of Florida, and the sole issue turned on the simple fact that if a wife in New York even knows about the fact that a husband had gone to another state, such as Florida, seeking a divorce and she fails to enter that case, she, her heirs, or anyone claiming by, through or under her, is forever barred from ever attacking by a direct attack the bona fides of the residence and is forever barred from claiming her rights under the New York decree.

REASONS FOR GRANTING THE WRIT

I.

The Courts of Florida have refused to give full faith and credit to the prior decrees of the State of New York in violation of Article IV, Section 1, of the United States Constitution.

II.

The Courts of Florida have denied to the widow, Lucy C. Simons, her constitutional property rights to which she was entitled under the laws of the State of New York by the mere subterfuge of an ex parte divorce case in the Courts of Florida, where the Florida Court did not have jurisdiction because of the lack of proper residence.

In the case of *Gene Durfee et ux., Petitioners,* v. *Julia E. Duke,* decided December 2, 1963, 84 S. Ct. 242, 375 U.S. 106, this Court laid down certain basic constitutional provisions that are applicable to the case at bar. In the reported case in 84 S. Ct. 242, this Court determined certain fundamental principles of law. *Headnote 2* provides as follows:

> "Full faith and credit requires every state to give to a judgment at least the res judicata effect which the judgment would be accorded in the state which rendered it."

Headnote 3:

> "By constitutional provision for full faith and credit, local doctrines of res judicata become a part of national jurisprudence and are therefore federal questions cognizable before the Supreme Court."

Headnote 5:

"A judgment of a court in one state is conclusive upon merits in a court in another state only if court in first state has power to pass on the merits, but when second court's inquiry discloses that those questions had been fully and fairly litigated and finally decided in the court which rendered the original judgment, that judgment is entitled to full faith and credit."

In the body of the opinion as shown in the text at page 247 of the citation in 84 Supreme Court Reporter, this Court said:

"It is argued that an exception to this rule of jurisdictional finality should be made with respect to cases involving real property because of this Court's emphatic expressions of the doctrine that courts of one State are completely without jurisdiction directly to affect title to land in other States. This argument is wide of the mark. Courts of one State are equally without jurisdiction to dissolve the marriages of those domiciled in other States. But the location of land, like the domicile of a party to a divorce action, is a matter 'to be resolved by judicial determination.' Sherrer v. Sherrer, 334 U.S. at 349, 68 S. Ct. at 1090, 92 L. Ed. 1429. The question remains whether, once the matter has been fully litigated and judicially determined, it can be retried in another State in litigation between the same parties. Under the reason and authority of the cases we have discussed, it is clear that the answer must be in the negative."

A typical example of the fallacious reasoning of the Florida Court in this case is the application of the principles laid down by the District Court of Appeal of Florida, Third District, in the case of *Macfadden* v. *Muckerman,* Fla. App. 1959, 116 So.2d 448. This was a case involving a complaint in the nature of a bill of review to set aside a decree of divorce entered in the Circuit Court of Dade County, Flor-

ida, on January 9, 1946. The lower Court dismissed the suit without leave to amend. This suit involves an attack upon an original suit filed by Bernarr Macfadden in the Circuit Court of Dade County, Florida, and it was claimed in that suit that Bernarr Macfadden had been a bona fide resident of Florida for ninety days prior to the institution of the suit, while in fact at all times prior and subsequent to the filing of the bill for divorce the said Bernarr Macfadden had been a resident of New York. In this case the appellate Court held that no direct or collateral attack could be made with reference to that divorce decree, even if based upon an ex parte divorce proceeding, where the only service was by publication, unless it could be established that a deceased husband who had filed the suit had fraudulently kept the wife from contesting or defending the action or had kept her in ignorance of the proceedings, or was guilty of other misconduct which would deprive the wife of an opportunity to have defended the action.

We have submitted to the Florida Appellate Court that that decision is not applicable to the situation in this case, and even if it was it is a pronouncement of law which is in conflict with the constitutional provisions of the United States Constitution. We submit that it is contrary to other opinions of the Supreme Court of Florida and other opinions of the other two District Courts of Appeal sitting in Florida in other territories of this state.

We are not here concerned with the existence or non-existence of a divorce so far as the parties were concerned, because as in the Macfadden case Mr. Simons was dead before this suit was filed. In that particular Macfadden case there is no intimation that the then Mrs. Macfadden had a binding, conclusive decree of separate maintenance in her favor in New York.

For example, may we assume that Mr. Simons had never come into the State of Florida and that he had procured a divorce in the nature of what is commonly called a "Mexican divorce". The Florida cases are very clear that the Florida Courts do not have any assumed jurisdiction where the matrimonial domicile of the parties has been in another state and where the Courts of that state have entered a decree either for separate maintenance on a permanent basis or even divorce. Let us assume for the sake of argument that the New York decree had been one for divorce, with certain property settlements granted. Could Mr. Simons have then come into Florida, moved his intangible assets to Florida and then filed a suit in Florida for divorce based upon published or substituted service by publication and obtain a divorce in Florida against the wife? We think it very clear that the Florida Courts would have no right to upset or annul the property settlements fixed in the New York divorce decree. We say that there is no difference in the case at bar, because the litigation in New York resulted in a final separation of the parties in 1946. One of the property rights of the wife was the fact that upon his death she would still be his legal widow and entitled to her rights under the New York law.

In an opinion by the Supreme Court of Florida in 1950, *Gaylord* v. *Gaylord*, 45 So.2d 507, that Court as set forth in headnote 6 held:

> "Florida Court should not attempt to determine validity of a decree of a sister state or of a foreign country unless something appears on face of record which discloses its invalidity, and the most that Florida Court should do is to decide in proper cases whether foreign decree should be accorded recognition under full faith and credit clause or rule of comity."

Later in an opinion by the District Court of Appeal of Florida, Second District, 1961, in the case of *Edgar* v. *Edgar*, 126 So.2d 585, it appeared that Mrs. Edgar had filed a suit in the State of Maryland on February 26, 1948, in which she obtained a divorce and the husband was ordered to pay $35.00 per week to the plaintiff as maintenance and support for the three minor children. On October 15, 1958, the wife filed an action in the Circuit Court of Lake County, Florida, seeking the enforcement of the Maryland decree. The husband was personally served and contended that the Maryland decree was not entitled to full faith and credit in Florida. The lower Court ruled that that decree was still binding and entered a decree enforcing the same. The former husband appealed. On page 587 of the reported decision this Florida Appellate Court discussed the application of Section 1 of Article IV of the United States Constitution and made this finding, as contained in the second column, on page 587:

> "The object of the full faith and credit clause and the act of Congress which implements it is to insure that if a decree or judgment has a certain effect in the state in which it is rendered, it shall have the same effect in every other jurisdiction. In view of this objective, it is, therefore, clear that a state is not compelled by the full faith and credit clause to give a divorce decree of a sister state a greater effect than it has in the state granting the decree; but, of course, the full faith and credit clause does not preclude a court from extending to such a decree a greater effect than it has under the law of the sister state."

In the conclusion set forth in paragraphs 7, 8, on page 589 of the reported decision, the Second District Court of Appeal of Florida said this:

> "The Supreme Court of Florida has emphasized that this state has no desire to furnish a legal haven

for fugitive husbands; Sackler v. Sackler, 47 So.2d 292, 18 A.L.R. 2d 856, and we might well add to that expression of public policy that an attempt to escape responsibility to pay child support is looked upon with equal disfavor."

In a later case by the same District Court of Appeal of Florida, Second District, in the case of *Clarence A. Borst, Appellant,* v. *Anna Borst, Appellee,* 1964, 161 So.2d 693, it was held:

Headnote 1:

"Florida court was precluded, by due process of law requirements, from affecting, on application of former husband who resided in Florida, alimony rights vested in wife under foreign decree where marriage, divorce and alimony proceeding all took place outside of Florida and wife had not submitted herself to jurisdiction of Florida court."

Headnote 2:

"Former wife's vested rights to alimony under foreign decree were personal and subject only to in personam jurisdiction over her, and could not be affected by court which had no personal jurisdiction over her on any theory that former husband's proceeding for relief was in effect quasi in rem."

The said Court quoted with approval in this opinion from 17 Am. Jur., Section 987 (Am. Jur. 17A), and cited with approval from Section 987:

"The divorce court must have jurisdiction of the wife in personam in order to adjudicate or cut off her right to alimony. While a court may gain jurisdiction to grant a divorce by constructive service upon a nonresident wife, such service does not give it jurisdiction to adjudicate alimony rights, and so it is held that an ex parte divorce, obtained by the husband, does not

necessarily affect the right of the wife to alimony under the laws of another state, and any express or implied adjudication against her claim is void and will not be given effect by comity or under the full faith and credit clause."

Further quoting, the Court quoted certain excerpts from 17A Am. Jur., Section 988, as follows:

"The rule is that where a wife obtains a divorce a mensa or a judicial separation and an award of alimony in one state, another state cannot adjudicate or terminate the right unless it gains jurisdiction in personam over the wife. A judgment for alimony is a property right, intangible in nature, and jurisdiction over an intangible can only arise from jurisdiction over the person."

Then the Court proceeds to analyze (text, p. 695) certain opinions of this Court, as follows:

"There are a series of cases from the United States Supreme Court which we think are conclusive on the issue herein. It is only necessary to note herein what we consider a 'trilogy' of decisions on the subject. This 'trilogy' is composed of Estin v. Estin, 1948, 334 U.S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561; Armstrong v. Armstrong, 1956, 350 U. S. 568, 76 S. Ct. 629, 100 L. Ed. 705; and Vanderbilt v. Vanderbilt, 1957, 354 U. S. 416, 77 S. Ct. 1360, 1 L. Ed. 2d 1456."

The Florida Court has apparently acted upon the erroneous presumption that a service of process by publication or mailing from the Florida Court to a resident of New York is the equivalent of personal service. This is an erroneous conclusion and, as pointed out in the opinion in the case of *Borst* v. *Borst*, above cited, on page 695, the Supreme Court of the United States has settled that principle of law in the case of *Armstrong* v. *Armstrong*, 1956, 350 U.S. 568, 76 S. Ct. 629, 100 L. Ed. 705, in which

this Court (U. S. Supreme Court) re-applied the doctrine of *Pennoyer* v. *Neff*, 95 U.S. 714, 24 L. Ed. 465.

In the petition for rehearing directed to the District Court of Appeal of Florida, Third District (see Appendix B), and in the petition for writ of certiorari directed to the Supreme Court of Florida, which was denied (see Appendix C), the petitioner has set forth in detail the conflicting Florida opinions and the opinions of this Court and it would only be repetitious for the petitioner to explain or argue—at least in this petition. We respectfully request the Court for general discussions to take cognizance of the authorities quoted in the petition for rehearing and in the petition for certiorari aboved referred to.

CONCLUSION

Inherent in any separate maintenance decree, particularly under the law of New York, two things are determined: (a) Permanent separation is ordered and alimony is awarded; and (2) the status of the wife as the lawful wife and lawful widow in the event of the husband's death is maintained.

Under the laws of New York where the husband resided at the time of his death, the title to all intangible property and the location or situs of that intangible personal property accompanies the person of the owner. This rule has been clearly enunciated by the Supreme Court of Florida in the case of *Beverly Beach Propreties* v. *Nelson*, 68 So.2d 604, *certiorari denied Rensta* v. *Beverly Beach Properties*, 75 S. Ct. 27, 348 U.S. 816, 99 L. Ed. 643.

In October, 1960, when Sol Simons died in New York, he was within the jurisdiction of the Courts of New York. He was bound by the alimony decree. He was the legal

husband of Lucy C. Simons on the date of his death and, conversely, she was his legal wife at the time of his death. The title and situs of his personal intangible property was subject to the laws of New York. Admittedly the right to alimony as such ceased with his death, but the property rights inherent under the laws of New York to the surviving widow were still in force and effect. These property rights were protected to her under the laws of New York and under the decree of separate maintenance which had been in effect since 1946. Could the husband or can the Florida executor void and cancel those inherent property rights of Lucy C. Simons simply by the fiction of the Florida divorce in 1952, in which Mrs. Simons was not personally served and in which she did not personally appear? We respectfully say that this is one of the most flagrant abuses in the otherwise confusing doctrines of conflicts between various states on matrimonial rights that we have ever seen. We respectfully urge that this Court take jurisdiction not only for the purpose of protecting the rights of Mrs. Simons, but to clear up the confusion which seems to be in existence in many states about this subject matter. If such an opinion and such a result which have come out of this case in the Florida Courts are to be allowed to continue, then certainly a chaotic condition will result. We respectfully say that the ultimate result of the Florida decisions is completely contrary to the prior decisions of this Court and should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1963

LUCY C. SIMONS,
Appellant,
vs.
MIAMI BEACH FIRST NATIONAL BANK, as Executor of the Estate of SOL SIMONS, Deceased,
Appellee.

Case No. 63-201

Opinion filed October 29, 1963.

An Appeal from the Circuit Court for Dade County, John J. Kehoe, Judge.

Ward & Ward; Montague Rosenberg; Charles Gertler, for appellant.

Sibley, Grusmark, Giblin, King & Levenson, for appellee.

Before CARROLL, PEARSON and HENDRY, JJ.

CARROLL, Judge.

Lucy C. Simons sued the executor of her deceased ex-husband, seeking to set aside his Florida divorce decree. From an adverse final decree she has appealed.

The wife had obtained a decree for separate maintenance with a support allowance in 1946 in New York. The husband sued for divorce in 1952 in Dade County,

Florida. The wife, then a resident of New York, was served by publication and received copies of the order for publication and the complaint. On advice of her attorney, she did not appear in the Florida divorce suit.

The husband was granted a final decree of divorce in his Florida suit on May 1, 1952. He continued to pay support money as previously ordered by the New York court until he died in 1960. His will was filed and probated in Florida. The wife sought dower in the probate court. When her application for dower met objection on the ground that she was not his widow, having been divorced, she filed this suit in the circuit court. In her complaint it was contended the Florida divorce decree obtained by the husband should be set aside for several reasons: (1) that the husband lacked the necessary Florida residence and had defrauded the court by falsely claiming residence, (2) that the New York separate maintenance decree was a bar to the divorce suit and that it was a fraud on the court for the husband to fail to disclose the earlier proceeding, (3) that the decree on its face showed want of jurisdiction, and (4) that after she received notice of the divorce suit the husband lulled her into inaction. The executor answered, and the cause was tried before the chancellor who found for the defendant and dismissed the suit with prejudice. The appellant argues the chancellor's adverse decision on those several contentions was error. On considering the arguments in the light of the briefs and record we conclude no reversible error has been shown.

By choosing not to appear in the Florida divorce suit the non-resident wife was precluded from filing suit years later to set aside the decree for matters which could have been litigated by her in defense of the divorce suit. She had due notice and opportunity to contest the hus-

band's allegations as to his jurisdictional residence and his asserted ground of divorce. If she had defenses to those matters it was her duty to assert them in the divorce suit, and the chancellor was eminently correct in holding she was not entitled to maintain the present suit to set aside the decree for those reasons. Mabson v. Mabson, 104 Fla. 162, 140 So. 801; Bernstein v. Bernstein, 160 Fla. 579, 36 So.2d 190; MacFadden v. Muckerman, Fla.App. 1959, 116 So.2d 448.

The prior New York separate maintenance decree was not a bar to a divorce suit by the husband, and his failure to disclose it in his complaint was not a fraud on the court. Matsis v. Matsis, 155 Fla. 786, 21 So.2d 545; Bernstein v. Bernstein, supra. Any affirmative defense the prior suit may have afforded should have been presented in the divorce suit. See Prall v. Prall, 58 Fla. 496, 50 So. 867, 26 L.R.A., N.S., 577; Bernstein v. Bernstein, supra; Gordon v. Gordon, Fla. 1952, 59 So.2d 40; Stone v. Stone, Fla.App. 1959, 111 So.2d 486; Taylor v. Taylor, Fla.App. 1961, 130 So.2d 115.

The basis for the contention that the decree showed want of jurisdiction on its face was because it incorrectly recited the defendant had answered. But the record indicates the chancellor was under no misapprehension as to nature and status of the case before him on final hearing. This is so because the master's report, which the court confirmed, showed the true situation in detail.

The appellant's claim that the husband, in 1952 after she had notice of his divorce suit, lulled her into inaction, was properly denied by the chancellor, for her delay (Barnes v. Willis, 65 Fla. 363, 61 So. 828) and on the merits. That issue was tried before the chancellor

in the instant case, in the course of which it was required that he judge the credibility of witnesses and resolve conflicts in the evidence, and his ruling thereon is adequately supported by the record.

For the reasons stated the decree appealed from is affirmed.

Affirmed.

APPENDIX B

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

LUCY C. SIMONS,
Appellant,
vs.
MIAMI BEACH FIRST NATIONAL BANK, as Executor of the Estate of SOL SIMONS, Deceased,
Appellee.
Case No. 63-201

Petition for Rehearing and/or Clarification

Comes now LUCY C. SIMONS, Appellant, and respectfully petitions the Court to grant a rehearing and reconsideration of the opinion and decision of this Court filed October 29, 1963, and for clarification, and respectfully assigns the following reasons therefor:

The analysis by this Court as to the nature of the suit in our opinion does not encompass the real issues and the real purposes in the suit.

The decedent husband, SOL SIMONS, died in New York in 1960, domiciled and resident as contended in the complaint and in the testimony of the same matrimonial

domicile and the same apartment occupied by him in 1946 when the plaintiff successfully prosecuted a separate action for alimony, and for permanent separation, under the laws of New York. The same grounds of cruelty were alleged by the wife against the husband in that case, and he, in turn, made a claim that it was her fault, and alleged the same grounds of cruelty against her. Not being grounds for divorce under the laws of the State of New York, a permanent separation decree was entered in favor of the wife.

The husband died in New York City, and as contended in the complaint and in the evidence, he had never become domiciled in any other place than the same residence in New York City.

He had continued with his alimony payments up to the date of his death. Therefore, on the date of his death, under the laws of New York and under the particular statutes of New York, LUCY C. SIMONS was his surviving spouse. She was entitled to all of his estate if he left no issue or parent or brother, sister, nephew or niece. There was no issue of the marriage, and if he had left anyone in the class of a parent or a brother, sister, nephew or niece, she would have taken one-half of the entire estate, subject to a few minor adjustments if there were actual parents living as against brother, sister, nephew or niece.

Under the New York law, the surviving spouse could not inherit from the deceased sponse where there had been a divorce recognized as valid in New York, or where the wife (in this case) had procured a divorce at her instigation in another state. Under the New York law, a foreign ex parte divorce would be recognized in New York if adequate notice and opportunity to defend was given and plain-

tiff was domiciled in the foreign state, but the finding of domicile in the ex parte divorce proceedings in a foreign state may be readjudicated by the courts of New York unless both parties had appeared voluntarily in that other state.

The statutes are clear that foreign ex parte divorce may not cut off the wife's right to support previously established in New York. That was the theory upon which Lucy C. Simons, upon the death of her husband, her claimed husband, in 1960 filed her claim as the lawful widow in the Probate Court of Dade County, Florida.

Objections were filed by the executor on the ground that Lucy C. Simons was not the lawful wife of Sol Simons at the date of his death because of an ex parte divorce decree which had been entered in Florida in the Circuit Court of the 11th Judicial Circuit, in and for Dade County, Florida, in April of 1952.

The theory and purpose of the complaint in equity was not solely to set aside a divorce decree, but was for the purpose of impressing her claim as a lawful widow to her share of the estate which would be by virtue of either the dower statutes of Florida or her surviving spouse rights under the New York law. Thus there were important property rights involved.

The lower court dismissed the complaint on the ground that she had admittedly had some notice of the filing of the Florida divorce case in 1952, and that she had not entered this case in Florida, and that since the wife did not sustain the burden of proving that she had been lulled into inaction, that she had no right to question the jurisdiction of the court in Florida to have granted a divorce affecting her rights as a spouse, either by way of dower or widow's rights, relying chiefly if not in toto upon the decision by

this Court of *MacFadden* v. *Muckerman*, (1959), 116 So.2d 448.

No consideration appears to have been given by the lower court to the fact that Sol Simons, as claimed in the suit and we say supported by the testimony, was a continued resident of and domiciled in the City of New York from 1946 on through the date of his death in 1960; that he died in New York City; that he had never left New York City; that he had never legally maintained any residence or domicile in Florida even at the time when he sought the jurisdiction of the Florida Court in 1952; that he continued throughout the years in the same domicile in New York City, and that when he died there his property, particularly his intangible estate, was with the body in New York State, and that she was entitled to those property rights fixed under the New York Statutes.

In the defense of the case, the executor contended that the estate was a Florida estate, that Mr. Simons was a resident of Florida or domiciled in Florida at the time he filed his suit for divorce in 1952, and that he had maintained that residence or domicile in Florida up until the time of his death; that he had drawn a will in which he named the Miama Beach First National Bank as his executor.

There was adequate proof, in our opinion, to show that Mr. Simons was domiciled in New York at the time of his death; that there was nothing better than a fiction of domicile in Florida at the time of the filing of the divorce suit in 1952; that he was in Florida only as a sham, as far as domicile was concerned; that even though he was advised by his own then attorney that he would have to give up his residence in New York, he continued to maintain that same residence on Yellowstone Boulevard in Greater New York, carried on his business from that place,

never moved from those premises, was there during his last illness and died there.

There has never been any determination by the lower court as to the weight of the evidence in that regard, nor was there any determination by the lower court from the evidence as to whether in truth and in fact Mr. Simons was ever a bona fide resident or domiciled bona fide in Florida within the purview of our statutes and our laws in Florida, so as to give the Florida Court jurisdiction to entertain a divorce action.

The sole issue determined by the lower court was that under the doctrine as generally laid down in the said *MacFadden* decisions, supra, she had knowledge of the pendency of the action, and that she was forever barred from raising the issue as to that point, regardless of the fact that he may not have been a proper resident or domiciled properly in Florida.

The court below did not purport to pass upon her right under the New York Statutes to have her proportion of the estate, wherever it might have been probated, for the protection of her claims.

In this regard the opinion of this Court restricted its analysis to four points—

(1) that the husband lacked the necessary Florida residence and had defrauded the court by falsely claiming residence;

(2) that the New York separate maintenance decree was a bar to the divorce suit and that it was a fraud on the court for the husband to fail to disclose the earlier proceeding;

(3) that the decree on its face showed want of jurisdiction;

(4) that after she received notice of the divorce suit the husband lulled her into inaction.

We respectfully say that the only point the lower court passed on was the 4th point just mentioned, when the court below found that Mrs. Simons had received notice of the divorce suit, and that the husband had not lulled her into inaction.

The gist of this Court's ruling on the affirmance is contained on page 2, in which this Court said:

> "By choosing not to appear in the Florida divorce suit the non-resident wife was precluded from filing suit years later to set aside the decree for matters which could have been litigated by her in defense of the divorce suit."

In support of this finding, this Court quoted three decisions, the first from *Mabson* v. *Mabson*, 104 Fla. 162, 140 So. 801. Briefly analyzing the facts in the *Mabson* case, it appeared that both the husband and wife had their matrimonial domicile at Winter Haven in Polk County, Florida; that on March 30, 1927, the wife left the husband and went to New York; that on April 4, 1927, the husband instituted an action for divorce based upon the ground of adultery. The service was by publication. The wife did not appear. After the divorce decree was entered in Florida, the wife, still being in New York, instituted a suit against the husband for separate maintenance and support. This suit was based on personal service on the husband, but the New York Court decided against the wife on the ground that the matrimonial domicile of the parties was in Florida and not in New York at the time the New York suit was instituted, and that the wife could not ask the New York Courts to determine her matrimonial rights to alimony when she herself had left the matrimonial jurisdiction.

She then later filed a suit in Florida in the nature of a bill of review. That case was dismissed and the dismissal was affirmed by the Supreme Court of Florida. It was pointed out (804):

> "At the time the husband sued his wife for divorce, the circuit court of Polk county had potential jurisdiction of both the parties, because that was their matrimonial domicile. It also appears that such court had jurisdiction of the subject-matter, because the complaint alleged and proved was a ground for divorce which was cognizable only by the courts of this state in a suit brought in this state to assert it and obtain relief with respect to it."

The Court pointed out that she actually received a copy of the notice and (804):

> "* * * she deliberately elected to ignore whatever insufficiency appeared on the face of the order of publication, and to allow the divorce suit in Florida to proceed to decree against her without objection on her part, while she was attempting to perpetrate a fraud on the courts of New York in attempting to have those courts mulch the husband in alimony and counsel fees, which she must have known could not have been awarded to her, in view of the place of the matrimonial domicile and the charges made and pending in the Florida divorce suit."

The Florida Court based its affirmance of the Circuit Court decision largely on the doctrine that the wife had been guilty of laches, inequitable conduct and waiver. The question of the husband's domicile in Florida, or even the matrimonial domicile of both the parties, was not involved in the case.

We respectfully say that this opinion does not support the construction placed upon it in the opinion by this Court, and does not sustain the conclusions reached by this Court.

The next case referred to is *Bernstein* v. *Bernstein*, 160 Fla. 579, 36 So.2d 190. This was a 1948 opinion. Hyman Bernstein filed a suit in the Circuit Court of Dade County, Florida, before N. Vernon Hawthorne, Judge, against his wife, Betty Bernstein. This was a suit by publication of service, served upon the defendant Betty Bernstein, who was a resident of New York. The attorney for Betty Bernstein, a Mr. Samuel Flasterstein, filed a letter in the court detailing the facts of a support proceeding that took place in the Domestic Relations Court of New York, wherein plaintiff was required to pay the defendant $30 a week for support of herself and her minor child. The Supreme Court of Florida, in its opinion (p. 191) pointed out that the chancellor below treated this letter as an appearance for the defendant, and gave the plaintiff additional time to plead. The chancellor entered an order directing a writ of ne exeat to be issued against the plaintiff, and a rule to show cause why he should not be adjudged in contempt for concealing the facts relating to the support proceeding referred to. There was a hearing on this rule. The plaintiff was adjudged guilty of contempt and sentenced to 45 days in the county jail. The complaint was dismissed with prejudice.

On appeal, the Supreme Court of Florida reversed both decrees sending the case back for further proceedings. The effect of this decision was simply a holding by the Supreme Court of Florida that that support decree by the Domestic Relations Court of New York was not on its face a bar to a suit for divorce. The Court pointed out that it might be expedient for the complaint to recite any preceedings in a foreign court for support and maintenance, but that it was not essential, and that such proceedings were matters of defense. They pointed out that since the lawyer had made these facts known to the court by

his alleged appearance and letter, the chancellor was free to consider them and make such decree for the defendant as he might deem advisable. The Court held that there was no basis for the contempt.

This was the sole determination in this case. The question of inherent domicile was not involved, nor was the jurisdiction of the Florida Court based upon the residence requirements involved in the case.

The last case referred to in support of this Court's opinion was *MacFadden* v. *Muckerman,* (Florida Appellate, 1959) 116 So. 2d 448. We have thoroughly expressed our analysis of the *MacFadden* case and have urged our construction of it, as reflected on page 15 of appellant's main brief, when we attempted to point out to the Court that the facts in the *Muckerman* decision can be distinguished, and that if construed as it had been construed by the lower court, it would be in direct conflict with the decisions of the Supreme Court of Florida in the case of *Chisholm* v. *Chisholm,* a 1929 decision, 125 So. 694, and *Dye* v. *Dolbeck,* 154 So. 847, and the later decision of *Kelly* v. *Kelly,* 75 So. 2d 191, a 1954 decision.

We respectfully contend that the doctrine of the Supreme Court of Florida, as represented by these decisions, does not preclude any spouse, or even an heir of that spouse, if the spouse is deceased, from questioning the jurisdiction of the Florida Court because of lack of domicile of the plaintiff in an ex parte divorce case. For the sake of argument, we will concede that this rule would apply if the only grounds asserted by the non-appearing spouse would be the question of sufficiency of the testimony covering the grounds of divorce, but we specifically urge that any conduct on the part of the wife, other than actual fraud or bad faith, would ever prohibit her from filing a

suit to make a direct attack upon the ex parte divorce on the sole ground that the husband lacked the necessary Florida residence.

We recognize that that is the implication which arises from the *Muckerman* decision, but we respectfully say that that is in direct conflict with the *Chisholm* v. *Chisholm* decision, supra, which point we specifically mentioned on page 18 of appellant's brief. In that opinion the Supreme Court of Florida did say that in a subsequent suit the defendant should not be held to question the sufficiency of the evidence adduced in support of the ground of divorce urged in the bill, but the reversal in that case was based upon this statement (125 So. 694, 704):

> "The jurisdictional infirmity because of complainant's lack of residence in Florida, however, is fatal to the decree, notwithstanding defendant's inattention to the suit."

On page 3 of the Court's opinion, this Court also points as authority several other decisions which we have not previously discussed. The first is *Matsis* v. *Matsis,* 155 Fla. 786, 21 So. 2d 545. This case was discussed fully at pages 18 and 19 of appellant's brief and may be distinguished. In the *Matsis* case, the husband had entered into a stipulation and a property settlement agreement which was presented before the Court and allowed. Thereafter the wife sought to set aside that settlement because she claimed it was unfair to her. The question of the jurisdiction of the court and the domicile of the party bringing the suit was not present.

This Court in its opinion then refers (p. 3) to *Prall* v. *Prall,* 58 Fla. 496, 50 So. 867. In this case (a 1909 decision by the Supreme Court of Florida) it appeared that John M. Prall filed a suit in Hillsborough County for divorce

against his wife, Emma L. Prall. The complaint alleged that in 1907, or some year prior thereto, he had filed a suit in the Circuit Court of Hillsborough County against his wife, got personal service, that she filed an answer waiving her right to take testimony and contest the same, and on the 2nd day of December, 1908, a decree of divorce was granted; that the defendant had made additional demands for moneys and property, and when he refused, that she filed an appeal from the decree of the Circuit Court. which ended on a reversal of the decree on the ground that there was no sufficient proof submitted.

He complained, however, that he was not given the right to amend or put on additional testimony, and hence he had to bring the second suit. The wife, through her counsel, then moved to dismiss the second suit and filed a plea setting up all of these matters. When this plea of res judicata was overruled, the defendant appealed solely from the order overruling the plea.

The Supreme Court pointed out that the first suit between the parties was for divorce upon statutory grounds of habitual indulgence by the defendant in violent and ungovernable temper. The trial court granted the divorce upon those allegations and proof, and the Supreme Court held that the allegations of facts were insufficient to state a cause of action, and that the complaint was not sustained by the facts, and that the proofs were insufficient.

The Court pointed out that the second suit was for divorce upon standard grounds of extreme cruelty, and pointed out that it was not the same cause of action, and that there were different facts alleged. The cause was simply sent back for further proceedings. There was no question in the case, so far as we can see, that would be applicable to or the authority for the situation discussed in the case at bar.

This Court has apparently construed these opinions as concluding the law of Florida that any defense or any claim made as to the invalidity of a divorce decree based upon service by publication, is barred unless it is brought as an affirmative defense in the action then pending. We say, respectfully, that these decisions collected do not appear to uphold that doctrine. The *Prall* case, does not uphold that doctrine, but the decision was somewhat to the contrary. The Court permitted the second case for divorce, but on different grounds.

In the case of *Gordon* v. *Gordon*, 59 So.2d 40, it appeared that in a reported case—160 Fla. 838, 36 So.2d 774, 4 ALR 2d 102, the Supreme Court of Florida had held that the proceedings in Pennsylvania were a bar to a subsequent proceeding in Florida. There is an extensive note by the authors of ALR appended to the decision (see 4 ALR 2d 102). In the original case, which was before the Circuit Court of Dade County, Florida, the Honorable Charles A. Carroll, Judge, the lower court had granted a divorce in favor of the wife. She brought her suit in Dade County, and it appeared that on January 18, 1946, she had brought an action for divorce on the ground of indignities to her person against the husband in Pennsylvania. Process was duly served. The husband appeared, filed his answer and the cause was then ready for trial. On June 25, 1946, the wife visited Miami Beach, Florida, and on September 30, 1946, notwithstanding the pendency of the action for divorce in Pennsylvania, she instituted a suit in the Circuit Court of Dade County, Florida. Service in this case was obtained on the husband by publication, but he filed his appearance in the action, and filed his answer to the plaintiff's bill of complaint. The issue being joined in Florida, a Special Master was appointed to take the testimony.

The plaintiff then petitioned the Pennsylvania Court for leave to discontinue her action for divorce, but that court denied it, and a Master was appointed in that court in May of 1947.

The Florida Master took testimony, and the Master's recommendation was that she be granted a divorce upon the charge of extreme cruelty. Then it appears that the Pennsylvania proceeding continued by the order of the court, but that the wife did not appear. The husband appeared in that case and gave voluminous testimony. That case was dismissed in favor of the defendant, the husband. This was in May or June of 1947. When that decree was obtained, the husband on July 9, 1947, filed his motion to dismiss the Florida complaint on the grounds that the issue between the parties had been settled against her contention in Pennsylania, and the Pennsylvania decree was entitled to full faith and credit under the provisions of Section 1 of Article IV of the Constitution.

The wife filed a motion to strike this plea of res judicata. The plea of res judicata was denied by the chancellor, and the court entered a final decree in favor of the appellee against the appellant, dissolving the bonds of matrimony.

The question presented to the Supreme Court of Florida on the first appeal is whether the chancellor had erred in failing to give full faith and credit to the final decree entered by the Pennsylvania Court. The question finally determined was that the two causes of action were identical, and the Supreme Court of Florida, through opinion rendered for the court by Mr. Justice Hobson, reversed the chancellor and remanded the case for further proceedings. Apparently when the case came back before the lower court, the husband then filed an answer in which he spe-

cifically pleaded the final decree rendered by the Pennsylvania Court rather than raising the question by motion. The Circuit Court permitted the wife to amend her pleadings and asserted that the husband had not only been guilty of extreme cruelty, but had been guilty of desertion. Based upon the new issues raised, the chancellor granted a decree in favor of the wife, notwithstanding the opinion in the first case by the Supreme Court finding that there was a different cause of action now alleged.

In this opinion on appeal to the Supreme Court (59 So. 2d 40) the amendment was treated as a new suit, and the Supreme Court held that the new suit did present new charges, new grounds for divorce, and was not barred by the Pennsylvania decree, and concluded that the Pennsylvania decree should not be held to operate as res judicata, nor should it be held to work as an estoppel by judgment because the doctrine of constructive desertion was not the same thing as was decided in the Pennsylvania Court.

The lower court in the case at bar did not see fit to settle any of those issues, although they were raised in the complaint and in the testimony. In this case, Mrs. Simons contended that the permanent separate maintenance decree in New York in which the husband was personally served, and which was held in the matrimonial domicile of the parties, was conclusive and was res judicata on the grounds for divorce with reference to claims for cruelty on the same facts and same charges as were involved in that case in New York. However, apparently the lower court said that did not make any difference, because if she had such a claim to make, she should have come into the Florida Court in 1952 and raised those questions, even though proceedings were pending in New York on additional pleadings at the time Mr. Simons filed his complaint for divorce in Florida in March of 1952.

The impact of these cases may have a collateral effect on this decision should this Court send the case back for further consideration, but we respectfully say that the Court either overlooked or failed to consider that the sole disposition of this case by the lower court was based upon the fact that since Mrs. Simons knew about the Florida case and did not appear, she was forever precluded from raising any kind of question about the validity of that divorce.

This Court also quoted *Stone* v. *Stone*, Fla. App. 1959, 111 So. 2d 486, an opinion by the District Court of Appeal of Florida, Third District, prepared by the Court by Honorable Charles Carroll, Chief Judge, who prepared the opinion in the case at bar.

In the *Stone* case, Morris S. Stone sued his wife, Evelyn L. Stone, for divorce in the Circuit Court of Dade County, Florida, alleging as grounds habitual indulgence in violent and ungovernable temper and desertion. The wife entered her personal appearance and counterclaim for separate maintenance, charging desertion. The court denied relief to either of the parties, and there was an appeal by both parties.

It appeared from the opinion (488) that Morris Stone had previously filed a suit for divorce against the wife in Ohio. His grounds alleged there were cruelty. Her cross-claim for separate maintenance was based upon a claim of desertion. The Ohio Court, after hearing the testimony, dismissed both claims.

In the Florida complaint filed thereafter, Morris Stone did not repeat his charge of cruelty but sued on separate grounds of habitual indulgence in violent and ungovernable temper and desertion. The wife filed her answer and

counterclaim charging Morris Stone with desertion and seeking separate maintenance.

This Court, speaking through Chief Judge Charles Carroll, held that the first suit was not conclusive as to the different causes of action in the second suit, and the case was sent back for trial on the claim by Morris Stone against Evelyn Stone, consisting of the claim of habitual indulgence in violent and ungovernable temper and desertion. The Court held, however, that the wife's counterclaim based upon desertion only, and being the same as she had filed in Ohio, was barred.

This case may be pertinent if the lower court had considered or made any findings or ruling upon the res judicata effect of the New York decree, but the case, in our opinion, is not authority for anything that has been passed upon by the lower court. It is true that we have argued in our briefs that the claims made by the husband in New York were identically the same claims which he made in Florida in 1952. The separation decree was entered in New York in 1946, and there were no additional grounds asserted. This is pertinent, but is not directly applicable in view of the lower court's ruling and the affirmance by this Court that any defense or any claim of irregularity filed by Mrs. Simons was barred because she had not come into the Florida case, and that she was forever foreclosed.

We respectfully say that the Court has narrowed the issues in the case far below what the real issues should be. We again contend, and respectfully urge to the Court, the consideration of the doctrine of the *Chisholm* case and other cases which we have mentioned, and contend that the lower court should have made a ruling one way or the other on the sufficiency of the evidence as to whether or not the husband, Sol Simons, had established sufficient evidence of domicile in this state so as to give the Florida Court juris-

diction in 1952 even over the husband to award a divorce on substitute service. It is one thing to say that the wife could not even present that evidence unless she showed that she had been lulled into inaction by her husband, which was the sole ground for the ruling of the lower court, and on the other hand to say that he had considered all of that evidence, and made a specific finding that Sol Simons was a resident of Florida for 90 days next preceding the filing of the suit in March of 1952, or that he continued to be a resident of Florida and domiciled in Florida up to the time of his death in December, 1960.

We raised the question in the lower court and also in this court that the full faith and credit clause of the constitution of the United States pertaining to judgments of other states also required this Court to pass upon and make a definite ruling upon the issues framed by the complaint and the answer. We contended in the complaint, established by the evidence, that Mr. Simons was a continuous resident of New York City; that he maintained a continuous domicile in his apartment on Yellowstone Boulevard from prior to 1946 until the date of his death in 1960; that he maintained his residence there, his place of business there, maintained his automobiles there. There was never any break in his residence in New York.

We asserted in our briefs as authority, that regardless of the validity of a Florida divorce, as far as the matrimonial affairs of the parties were concerned, that it did not and could not affect the personal rights of the parties, or defeat her claim as the surviving spouse under the law of New York, particularly on his intangible property, the title and possession of which followed his person. We respectfully say that the Court below and this court should have found that her claim as a spouse under the New York law could not have been discharged or abro-

gated; that she was his wife in New York up to the time of his death, and that she is still his legal wife as far as New York is concerned. The fact that the property of the estate, which consisted entirely of intangible properties, was purported to have been transferred to Florida simply by the appointment of a Florida banking corporation as executor, does not change the real domicile.

We have previously in our briefs referred to numerous decisions, including Federal Supreme Court opinions. In addition to the Supreme Court of the United States opinions which we quoted at great length in our briefs, we refer this Court to annotations on this subject contained in 168 ALR beginning at page 793, which cover the question of dower rights as affected by divorce in another state or country.

In our previous briefs we referred to the *Pawley* decision, Supreme Court of Florida, 46 So. 2d 464, which is also carried at 28 ALR 2d 1358. Beginning at page 1378 is an extensive note upon the validity of a foreign divorce granted upon constructive service and precluding action by the spouse for alimony, support or maintenance.

It is clear that under these decisions which we have pointed out, we feel sufficiently, in our original briefs, that under the doctrine laid down by the United States Supreme Court in the various decisions, a husband cannot in the face of an alimony decree for perpetual and separate maintenance in the State of New York, then leave the matrimonial state while he is continuing in the litigation in New York State, set up a purported residence in Florida, obtain an ex parte divorce decree in Florida without any appearance by the wife, go back to New York and spend the last eight years of his life in New York State, continuing his alimony payments in New York State

to the date of his death, die in New York, his whole estate consisting of intangible personal property which follows his body and is in his possession wherever he is, and then totally avoid any liability to his wife by simply drawing a will and appointing Florida executors.

The clearest exposition of the wife's right in such a circumstance is set forth in one of the latest opinions on this subject by the Supreme Court of the United States in the case of *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416, 77 S. Ct. 1360. In this case the husband and wife separated while they were domiciled in New York. The husband then went to Nevada and secured a divorce in which the wife was not personally served in Nevada, nor did she appear in that court. The Supreme Court of the United States held that such a Nevada divorce Court had no power to extinguish any right which the wife had under the law of New York to financial support from her husband.

In the body of the opinion, the court again cited the *Estin* v. *Estin* case, 334 U.S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561, 1 ALR 2d 1412, which we have relied upon in our main brief. The Court concluded by saying (1362):

> "It has long been the constitutional rule that a court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. Here, the Nevada divorce was as powerless to cut off the wife's support right as it would have been to order the husband to pay alimony if the wife had brought the divorce action and he had not been subject to the divorce court's jurisdiction."

The Court said further (1363):

> "Petitioner claims that this case is governed by Thompson v. Thompson, 226 U.S. 551, 33 S. Ct. 129, 57 L. Ed. 347. For the reasons given in a concurring opinion in Armstrong v. Armstrong, 350 U.S. 568, 575,

at 580-581, 76 S. Ct. 629, 636, 100 L. Ed. 705, the Thompson case, insofar as it held that an ex parte divorce destroyed alimony rights, can no longer be considered controlling."

The dissenting opinions in this case by Justice Frankfurter, beginning at page 1363, and the one by Justice Harlan, beginning page 1367, fully point out just what the majority of the court held. This may be concluded by the statement by Justice Harlan when he said (p. 1367):

> "The Court holds today, as I understand its opinion, that Nevada, lacking personal jurisdiction over Mrs. Vanderbilt, had no power to adjudicate the question of support, and that any divorce decree purporting so to do is to that extent wholly void—presumably in Nevada as well as in New York—under the Due Process Clause of the Fourteenth Amendment, pursuant to the doctrine of Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565."

He further points out (p. 1368) that even though the majority opinion designated the rights of the wife as property rights, that he sees no reason why Nevada cannot adjudicate the incidence of the marital statutes.

We are not purporting to re-argue this case, and we are quoting this decision, which we did not quote in our original brief, to show the construction placed by the Supreme Court on the *Armstrong* case and the *Estin* case, which we did rely upon in full. We think there is a very strong constitutional question involved, and we sincerely and earnestly seek a reconsideration by this Court of its opinion. We respectfully say that this cause should be sent back to the lower court under the doctrine of the *Chisholm* case and other cases which we have referred to, so that, among other things, the lower court can determine, or is permitted to determine, the merits as to

whether Mr. Simons ever had a sufficient domicile in Florida to give the Florida Court its required jurisdiction. That is the first point that ought to be decided, because it is true that would be decisive of the whole case.

On the other hand, there are also these other important property rights and constitutional rights, as to whether this wife can be deprived of her property rights when her husband died as a husband and domiciled in New York City, simply upon a claim by a local bank serving as an executor of his estate. There is no question but what, if this estate is probated in New York State, as it should have been, that the wife's interest would have been fully protected. Can her rights be defeated by the mere surface scheme of allegedly transferring these assets as of date of death to Florida?

These are points that ought to be decided by this Court, but they have not yet been passed upon by the lower court in view of the restricted phase of its ruling.

Respectfully submitted,

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MONTAGUE ROSENBERG
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Miami Beach, Florida
CHARLES GERTLER
420 Lincoln Road
Miami Beach, Florida
By /s/ W. G. WARD
W. G. WARD, of Counsel
Attorneys for Plaintiff, Lucy C. Simons, Appellant Herein.

I hereby certify that copy of the foregoing petition for rehearing and for clarification was this 13th day of November, 1963, mailed to counsel for the appellee, Messrs. Sibley, Grusmark, Giblin, King & Levenson, 605 Lincoln Road, Miami Beach, Florida.

/s/ W. G. WARD
W. G. WARD

APPENDIX C

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1963
FRIDAY, NOVEMBER 22, 1963

LUCY C. SIMONS,
Appellant,
vs.
MIAMI BEACH FIRST NATIONAL BANK, as Executor of the Estate of SOL SIMONS, deceased,
Appellee.

Case No. 63-201

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:

WILLIAM P. CARTER
Clerk District Court of Appeal, Third District
By /s/ Louis J. Spallone
Chief Deputy Clerk

(Seal)

APPENDIX D

IN THE SUPREME COURT OF FLORIDA.

LUCY C. SIMONS, a widow,
Petitioner,

vs.

MIAMI BEACH FIRST NATIONAL BANK, a banking institution organized and existing under the laws of the United States, with its principal place of business in the City of Miami Beach, Dade County, Florida, as Executor of the Estate of SOL SIMONS, deceased,
Respondent.

Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District

TO THE SUPREME COURT OF THE STATE OF FLORIDA:

Petitioner, Lucy C. Simons, presents this, her petition for a writ of certiorari, and states:

1. Petitioner seeks to have reviewed a decision and mandate of the District Court of Appeal of Florida, Third District, opinion filed October 29, 1963, order denying petition for rehearing filed November 22, 1963.

2. This petition is presented under and pursuant to Article 5, Section 4 of the Florida Constitution, and Rule 4.5c of the Florida Appellate Rules.

3. This petition is accompanied by a partial certified transcript of the record of the proceedings, including the decision petitioner seeks to have reviewed, and a supporting brief.

4. The following are the pertinent or controlling facts:

(a) On February 23, 1962, petitioner filed a suit in the Circuit Court for the 11th Judicial Circuit, in and for Dade County, Florida—chancery number 62C 1980. The case was assigned to the Honorable John J. Kehoe. The complaint is shown R. 1-24.

(b) The complaint showed that Sol Simons had married the petitioner, Lucy C. Simons, sometime prior to 1946; that in 1946 Lucy C. Simons had filed a suit in the Supreme Court of the State of New York against Sol Simons, seeking a decree of permanent separate maintenance on the ground of cruelty. This resulted in a final decree of separate maintenance on said grounds in favor of the plaintiff wife, the petitioner herein, Lucy C. Simons (R. 8). The actual decision of the New York Court was attached as an exhibit to the complaint (R. 19).

(c) It is alleged in the complaint that the parties had been living in New York since their marriage in 1941; that at the time of the separation the parties lived in New York; that both parties were present in the New York Court in a hotly contested separate maintenance action; that the wife was successful; that she was awarded approximately $500 per month, which alimony was paid; that Sol Simons continued to live in the home or apartment where the parties had resided for many years as their matrimonial domicile; that from 1946 to the date of his death in New York City in 1960, he continued to live at the same place in New York City; that he continued to keep up his alimony or support payments under the New York decree, and that when he died, he was a resident of New York.

(d) It is further alleged that Lucy C. Simons under the law of New York was his widow and entitled to dower.

(e) The complaint shows that Sol Simons had come to Florida and had obtained a divorce by ex parte divorce

proceedings in the Circuit Court of Dade County, Florida, final decree being entered May 1, 1952 (R. 17). The decree on its face recited that the case was heard upon the bill of complaint, the defendant's answer and the report of the Special Master.

(f) It is charged in the complaint, all as analyzed in the opinion of the District Court of Appeal of Florida, Third District—(1) that the husband lacked the necessary Florida residence and had defrauded the court by falsely claiming residence; (2) that the New York separate maintenance decree was a bar to the divorce suit and it was a fraud on the court for the husband to fail to disclose the earlier proceeding; (3) that the decree on its face showed want of jurisdiction; (4) that after she received notice of the divorce suit, the husband lulled her into inaction.

(g) A motion to dismiss the complaint was filed, and was overruled (R. 27).

(h) The answer of the Miami Beach First National Bank, as Executor, was filed (R. 28), and the issue raised was based solely upon the ground that the divorce suit in Florida based upon the ex parte decree in 1952, completely severed or discharged any right or claim of dower which Lucy C. Simons had in the Estate of her husband at the time of his death in 1960.

(i) As pointed out in the opinion of the District Court of Appeal of Florida, Third District, there were four grounds for attack, but the lower court, after overruling the motion to dismiss the complaint, and hearing substantial testimony and considering numerous exhibits, did not purport to pass upon the weight of the testimony except insofar as it applied to the fourth point, that is to say, that the wife had been lulled into inaction after she had received notice of the filing of the Florida action.

(j) It has been admitted throughout the proceedings that Mrs. Simons did receive a copy of the notice of the filing of the suit in Florida under the usual form of service by publication and by mail. She did contend that after she received that notice she had a discussion with her husband in New York City, and that he had advised her that the Florida proceeding would be dismissed. It was shown that during the time the proceeding was pending in Florida, the husband was personally present and was a part of an amendatory proceeding in the Courts of New York wherein the wife was asking for additional alimony.

(k) On this phase of the case, and that phase only, the lower court, Honorable John J. Kehoe presiding, entered his order on the 30th day of January, 1963 (R. 34), based solely upon the fact that Lucy C. Simons had not sustained the burden of proof of showing that she had been lulled into inaction after she had notice of the divorce suit. Page 845 original record, see excerpt supplemental record.

(l) The lower court did not pass upon the contentions (1) that the husband lacked the necessary Florida residence and had defrauded the court by falsely claiming residence; (2) that the New York separate maintenance decree was a bar to this suit in Florida and was a fraud upon the court in Florida; (3) that the decree on its face showed want of jurisdiction. These points have never been passed upon by the lower court.

5. (a) All of the essential factual matters that are necessary for this Court to determine, whether there is a conflict in this opinion with previous opinions of this Court, are contained in the opinion of the District Court of Appeal itself. The Court points out (157 So. 2d 200) that the wife had obtained a decree for separate maintenance with a support allowance in 1946 in New York. The opinion

points out that the husband sued for divorce in 1952 in Dade County, Florida, and that the wife was served by publication and received copies of the order for publication and of the complaint, and on the advice of her attorney in New York, she did not appear in the Florida divorce case.

(b) The opinion then points out that the divorce in Florida was granted on May 1, 1952, and that the husband continued to pay the support money as previously ordered by the New York Court until he died in 1960. They point out that the will was filed and probated in Florida, and the wife sought dower in the Probate Court of Dade County, Florida.

(c) What is not pointed out in the opinion is that he died while a resident of the City of New York in the State of New York; that under the law of the State of New York she was his widow and entitled to widow's rights, whether it be dower or otherwise. The opinion did not disclose that the testimony showed that the alleged residence of the husband in Florida in 1952 was a mere sham and subterfuge; that the wife had met the burden of proof in the New York case in 1946 with reference to her allegations on the grounds of cruelty; that the actual findings of the lower court, Honorable John J. Kehoe, had been strictly restricted to the question as to whether the husband had lulled her into inaction.

(d) The Chancellor had before him the question as to whether under the decisions of the Florida Appellate Court, Third District, 1959, of *MacFadden* v. *Muckerman*, 116 So. 2d 448, a wife was barred from attacking a Florida divorce decree based upon service by publication if it could be established that she ever received service or otherwise had knowledge of the pendency of the case.

(e) The controlling issue in this case which must first be determined, and which we say is in conflict, is that part of the opinion of the District Court of Appeal of Florida, Third District, now under attack (157 So. 2d 199, 200), wherein that Court said:

> "By choosing not to appear in the Florida divorce suit the non-resident wife was precluded from filing suit years later to set aside the decree for matters which could have been litigated by her in defense of the divorce suit. She had due notice and opportunity to contest the husband's allegations as to his jurisdictional residence and his asserted ground of divorce. If she had defenses to those matters it was her duty to assert them in the divorce suit, and the chancellor was eminently correct in holding she was not entitled to maintain the present suit to set aside the decree for those reasons."

quoting certain Florida decisions, including the decision by the District Court of Appeal, Third District, of *MacFadden* v. *Muckerman*, mentioned above.

The Court then found:

> "The prior New York separate maintenance decree was not a bar to a divorce suit by the husband, and his failure to disclose it in his complaint was not a fraud on the court. * * * Any affirmative defense the prior suit may have afforded should have been presented in the divorce suit."

Then the Court said:

> "The basis for the contention that the decree showed want of jurisdiction on its face was because it incorrectly recited the defendant had answered. But the record indicates the chancellor was under no misapprehension as to nature and status of the case before him on final hearing. This is so because the master's

report, which the court confirmed, showed the true situation in detail."

(f) We point out to the Court that the only point the lower court had passed on was that the plaintiff could not come into equity if she had knowledge of the first divorce suit while she was a resident in New York. The two points which are mentioned by the Appellate Court were not passed upon by the lower court at all.

(g) The controlling issue is the final holding by this decision of the Third District that no matter how bad or how defective the proceeding in Florida brought by the husband was, no matter if it clearly disclosed that the husband did not have any jurisdiction or any residence in Florida to give jurisdiction, that no matter how fraudulent the proceedings were, the wife had to answer the summons by substituted service, and raise all of those questions or she was forever barred.

(h) We think this Court will immediately see that there has been given a judicial and legal effect to a service by publication or by mail service, far greater than is even afforded to personal service upon an alleged defendant under the Florida law.

(i) To this extent, and as we have charged and explained in the briefs, this decision violates and is in direct conflict with the several opinions by the Supreme Court of Florida, beginning with the case of *Chisholm* v. *Chisholm*, 125 So. 847; *Kelly* v. *Kelly*, Supreme Court of Florida, 75 So. 2d 191. Although these cases and many others in Florida were clearly presented to the Court, the opinion of the District Court of Appeal does not reflect any attempt by the Court to distinguish those cases. The opinion under attack simply holds unequivocally that any knowledge Mrs. Simons had of the pendency of the Florida case

required her to come into Florida and defend that case, or be forever barred.

(j) In these cases, which we will discuss in the supporting brief, this Court has definitely held that where there is a jurisdictional infirmity because of the plaintiff's lack of residence in Florida, that that fact is fatal to the decree, and that the decree is void, not merely voidable, and is not binding upon the other party who has simply been served with process but has never appeared.

(k) In the case of *Kelly* v. *Kelly*, 75 So. 2d 191, which we will further discuss in our brief, this Court held that where the wife waited practically two years to file a suit to set aside a divorce decree in favor of her husband in Florida, there was no laches, in the absence of a showing of legal injury, embarrassment or disadvantage to the husband.

(l) We have not attached to the certified copy of the record at this stage of the proceeding the rather lengthy transcript of the actual testimony, and the exhibits in the Circuit Court action, or the record and exhibits which were forwarded to the Appellate Court. We respectfully request that under the provisions of Rule 4.5 Appellate Procedure, last paragraphs of subdivision c, that if this Court determines to entertain the petition for certiorari, that it will then enter such additional order as it may deem fit and proper with reference to further briefs or further records.

(m) As an additional or collateral factor, the District Court of Appeal in its opinion did not purport to even pass upon another controlling feature of the law. The main purpose of the proceeding in the Circuit Court was to establish the widow's right to dower in the estate of Sol Simons. When Sol Simons died in New York City while

a resident, as we contend, of the State of New York, Lucy C. Simons was his legal widow. She had been declared to be entitled to a separate maintenance decree on the same grounds which would have constituted her right for divorce in Florida, had the parties been residents in Florida, that is to say, extreme cruelty. The parties had not lived together since 1946, and there could not have been any grounds of matrimonial cruelty as between the parties since 1946 because they had not purported to live together as husband and wife. Mrs. Simons had a property right as the widow of Sol Simons. This was a right guaranteed to her under the Constitution of the United States, which requires that full faith and credit be given to the decrees of the courts of a sister state. These fundamental rights are an essential part of a constitutional guaranty, and raise not only a problem for this Court to pass upon, but raise a federal question. The decree of the New York Court is res judicata and is binding on any court of the land.

(n) For a recent exposition of the law on this question, we refer this Court to the recent opinion of *Durfee* v. *Duke*, December 15, 1963, Advance Sheet, Supreme Court Reporter, 84 Supreme Court 242, decided December 2, 1963.

(o) In the *Durfee* v. *Duke* case, the Supreme Court of the United States was involved with a question of full faith and credit, and validity of a judgment by the Supreme Court of Nebraska, upholding the title of Nebraska citizens to a strip of land formerly in the State of Missouri, and south of the channel of the Missouri river, the dividing line; as against the claim of the former owners of the property, who lived in Missouri, and who owned the land formerly in Missouri. The Federal Courts of Missouri, including the U. S. Court of Appeals for the Eighth Circuit, held that the Nebraska Court had no jurisdiction. The Supreme Court

of the United States granted certiorari, and held that even if it did not have actual jurisdiction over the res the fact that the Missouri parties went into the Nebraska Court, made that decree res adjudicata as between the parties but not in settling the boundary line between the States. The Court referred to *Sherrer* v. *Sherrer*, 334 U.S. 343, 68 Supreme Court 1087, 92 L. Ed. 1429. It held that although the divorce doctrine had not been applied to land titles, and this was a case of first impression, the appearance of the parties in Nebraska Court where the issues were determined, was final, and all other Courts thereafter had to recognize it. In the Sherrer case, which involved a Florida divorce, where the Probate Court of Massachusetts refused to recognize it, the Supreme Court of the United States held in effect that the personal appearance of both spouses in Florida and contested in Florida, could not be relitigated, and distinguished the case of *Williams* v. *North Carolina*, 325 U.S. 226, 65 Supreme Court 1092, 89 L. Ed. 1577, 157 A.L.R. pointing out that the doctrine of the Williams case was still law because in the Williams case one of the spouses did not appear in the State Courts of Nevada. See page 1090 of 68 Supreme Court Reporter. On page 1091 in the same Sherrer case, the Supreme Court distinguished the Sherrer case with the previous opinion of the Supreme Court of *Andrews* v. *Andrews*, 188 U.S. 14, 23 Supreme Court 237, 47 L. Ed. 366. In that case the husband, who had been domiciled in Massachusetts, instituted a divorce action in South Dakota. The wife first appeared by counsel in the South Dakota Court, and then pursuant to a consent agreement between the parties, withdrew her appearance. Nevertheless the South Dakota Court entered a divorce decree. After the divorce the husband returned to Massachusetts (just like the case at bar where Mr. Simons immediately returned, if he had ever left New York). Mr. Andrews remarried, and then died while he was in Massa-

chusetts. The Massachusetts Court in the Probate proceeding held that the South Dakota decree of divorce was void as to the property rights, and held that the first wife was entitled to the estate, as against the claim of the second wife. This was appealed to the Supreme Court of the United States and affirmed. The effect of the Durfee decision if applied to the Simons case would result in the conclusion that the decree in the contested separate maintenance case in New York in 1946, where Mrs. Simons was granted a permanent separation with alimony for life, and upon Simons death establishing her status as his widow, is res adjudicata, and a Florida divorce thereafter granted on the same issues without the personal appearance of the wife in Florida, would be a nullity on the property rights of the wife.

See also *Armstrong* v. *Armstrong*, 350 U.S. 568, 76 Supreme Court 629, 99 L. Ed. 1248, 123 N.E.2d 267. This case arose from an ex parte divorce decree in the Circuit Court of Dade County, Florida, where the Ohio Supreme Court applying the doctrine in the case of *Pawley* v. *Pawley*, 46 So. 2d 464, held that the ex parte divorce decree in Florida had no effect upon the wife's property rights or claim in interest in property held by the husband.

(p) The questions pertaining to the property rights of this widow were fully presented to the lower court and to the District Court of Appeal of Florida, Third District. The lower court, as well as the District Court of Appeal, completely ignored this property right issue and treated this case as if Mrs. Simons were still living. The issue as to whether the divorce was effective to support a claim that the parties were, in fact, divorced a vinculo matrimonii by virtue of the Florida decree, is of no importance. It is only the effect or claimed effect of

that decree based upon substituted service which is important.

(q) The question, therefore, is very clear, that a husband living in New York City, whose property and person are in New York at the time of his death, can circumvent the rights of his wife by simply declaring himself in a prior will to be a resident of Florida, and appointing a Florida bank as the executor of his estate.

(r) If such a proceeding can be used to circumvent the rights of the widow, then truly all full faith and credit of foreign decrees has been ignored by the appellate decision.

(s) The primary conflict which is simply raised from the face of the opinion, clearly shows that this opinion, if permitted to stand, is not only directly in conflict with the Florida decisions above mentioned, but purports to give the right to a husband to completely violate the laws of the state in which the parties had their matrimonial domicile, and to defeat the rights of the wife. We have here a case where Lucy C. Simons in the State of New York is the legal widow of Sol Simons, deceased. Can she be defrauded of her rights as his widow by the process used herein? According to the opinion under attack she can be, simply by service by publication, without any finding or determination by the Florida Court, that Sol Simons was actually a bona fide resident of Florida so as to give the Florida Court jurisdiction. If this case were permitted to stand, it would be a shocking situation, and one not at all consistent with the actual and specific cases and decisions of the Supreme Court of Florida, but it is dead contrary to the concepts of the federal doctrines which have been in force and effect since the famous decision of *Pennoyer* v. *Neff*, 95 U.S.

714, 24 L. Ed. 565; *Rice* v. *Rice*, 336 U.S. 674, 69 Sup. Ct. 751, 93 L. Ed. 957; *Armstrong* v. *Armstrong*, 350 U.S. 568, 76 Sup. Ct. 629, 349 U.S. 915; *Williams* v. *State of North Carolina*, 317 U.S. 287, 63 Sup. Ct. 207, 87 L. Ed. 279.

(t) These matters have not been covered by the opinion of the District Court of Appeal, Third District, but are pertinent and controlling. However, there is no question but that Lucy C. Simons did know about the Florida proceeding, and that she did not come into the State of Florida to oppose that proceeding. If this Court sees fit to uphold that doctrine, although in conflict with this Court's decisions in other cases, then further briefing or further records in this case before this Court would not be of any assistance. If, on the other hand, this Court will not adhere to that broad doctrine, then we respectfully petition the Court to permit oral argument, and to permit us to present detailed briefs with reference to the other phases of the case just as they were presented before the lower court and before the District Court of Appeal of Florida, Third District.

Respectfully submitted,

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Miami Beach, Fla.

CHARLES GERTLER
420 Lincoln Road
Miami Beach, Fla.

By .....
W. G. WARD, of Counsel
Attorneys for Petitioner, Lucy C. Simons

I hereby certify that copy of the foregoing petition for writ of certiorari was this 21st day of January, 1964, mailed to counsel for the respondent, Messrs. Sibley, Grusmark, Giblin, King & Levenson, 605 Lincoln Road, Miami Beach, Florida.

.....

W. G. WARD

APPENDIX E

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1964

WEDNESDAY, MAY 13, 1964

LUCY C. SIMONS, a widow,
Petitioner,
vs.
MIAMI BEACH FIRST NATIONAL BANK, etc.,
Respondent.

Case No. 33,206

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal, Third District of Florida, in said cause bearing date October 29, 1963, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied

A True Copy

TEST:

/s/ Guyte P. McCord
Guyte P. McCord
Clerk Supreme Court

STATE OF FLORIDA)
)
COUNTY OF DADE)

I, WILLIAM P. CARTER, Clerk of the District Court of Appeal of Florida, Third District, DO HEREBY CERTIFY that the above and foregoing order is a true and correct copy of a true copy of the order of the Supreme Court of Florida denying a petition for writ of certiorari to this court as certified to me by Guyte P. McCord, Clerk of the Supreme Court of Florida, in the case of LUCY C. SIMONS, a widow, Appellant, vs. MIAMI BEACH FIRST NATIONAL BANK, as Executor of the Estate of SOL SIMONS, Deceased, Appellee, CASE No. 63-201.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Court this 22nd day of July, A.D. 1964.

/s/ William P. Carter

(Seal)

Clerk District Court of Appeal of Florida, Third District